

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

Tracey Schelin,

Complainant,

AWARD OF LITIGATION COSTS AND
ATTORNEY'S FEES

v.

PGI Companies, Inc.,

Respondent.

The above-entitled matter came on for hearing before Administrative Law Judge Allen E. Giles commencing on February 6, 1995 at the Scott County Courthouse in Shakopee, Minnesota.

Marcia S. Rowland, Attorney at Law, Standke, Greene & Greenstein, Ltd., 17717 Highway 7, Minnetonka, Minnesota 55345, appeared on behalf of the Complainant.

Karen A. Chamerlik, Attorney at Law, O'Neill, Burke, O'Neill, Leonard & O'Brien, 800 Norwest Center, 55 East Fifth Street, St. Paul, Minnesota 55101, appeared on behalf of the Respondent.

On June 20, 1995, a Decision was issued in this case which found that the Respondent had committed unfair discriminatory practices in violation of the Minnesota Human Rights Act. As a part of the Order, reasonable attorney's fees, litigation and hearing costs were awarded. Because the Judge had an inadequate record for awarding damages on these issues, the parties were asked to submit documentation and argument concerning these damage awards. The final submission was received from Respondent on August 22, 1995. An Order issued by the Minnesota Court of Appeals dismissing the appeal of this matter as premature was received on August 24, 1995.

STATEMENT OF ISSUES

The following issues are presented:

- (1) What amount of litigation hearing costs should be awarded.
- (2) Whether the attorney's fees submitted on behalf of Complainant are reasonable.

(3) Whether the costs submitted on behalf of the Complainant are reasonable and properly taxable to the Respondent.

Based upon all of the files, records, and arguments of counsel, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Complainant filed a charge of discrimination with the Minnesota Department of Human Rights on January 5, 1994. Because the Department of Human Rights had not issued a determination with respect to Complainant's charge of discrimination within 180 days from the filing of the charge, Complainant requested that a hearing be held before an Administrative Law Judge pursuant to Minn. Stat. § 363.071, subd. 1(a) (1994).

2. The trial of the merits of this matter occurred over three days (February 6-8, 1995) with each daily session lasting approximately eight to ten hours. Testimony was received from 14 witnesses and 42 exhibits were received as evidence in the proceeding.

3. In an Order issued in this docket dated June 20, 1995, the Complainant was awarded damages for mental anguish and suffering in the amount of \$100,000, punitive damages in the amount of \$8,500, compensatory damages equal to three times lost wages in the amount of \$50,201.82, and prejudgment interest on \$16,733.94 lost wages accruing from August 27, 1993, and continuing until paid in full. The Judge also ordered the Respondent to cease and desist from the discriminatory practices set forth in the Decision, required that all persons employed by Respondent in a management or supervisory capacity receive appropriate training with respect to sexual harassment and employment discrimination based on sex, and order Respondent to pay a civil penalty of \$100,000 to the General Fund of the State of Minnesota. The Order also indicated that the Department of Human Rights hearing and litigation costs and reasonable attorney's fees and costs would be awarded.

4. Complainant filed a letter memorandum on June 27, 1995 requesting attorney's fees and costs. Respondent replied in a letter memorandum dated July 3, 1995. Upon receiving these arguments, the Judge determined that the record was inadequate for determining the reasonableness of the requested attorney's fees. By letter dated July 14, 1995, the parties were directed to make further submissions that would allow the Judge to make findings consistent with the legal principles developed in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). Complainant submitted a Petition for attorney's fees along with supporting affidavits on August 3, 1995. The Petition is supported by Affidavits of Marcia S. Rowland, Mark E. Greene, Bradley W. Solheim and Marsh J. Halberg. Respondent submitted a reply memorandum along with Affidavit of Michelle McQuarrie Colton on August 22, 1995.

5. Complainant has requested attorney's fees totalling \$58,500.00 and costs and expenses totalling \$687.78. The total of \$58,500.00 includes a "lodestar" upward adjustment of one-third of the total damages and interest awarded to Complainant. Complainant has supplied a detailed time printout showing 188.4 hours expended for

representation of Complainant in this proceeding. The customary fee charged by the Standke, Greene law firm is \$175.00 per hour.

6. Complainant was represented by Marcia S. Rowland. Ms. Rowland has approximately 17 years' experience practicing law within the State of Minnesota. She began her legal career as Assistant County Attorney for Carver County and she was subsequently appointed and elected to the position of Carver County Attorney. Ms. Rowland has extensive experience in litigation and is known to be a skillful, effective litigator. Affidavits of Bradley W. Solheim, Mark E. Greene. She handles employment discrimination cases for the law firm of Standke, Greene & Greenstein, Ltd.

7. The agreement between Complainant and the Standke, Greene & Greenstein, Ltd. law firm call for a 33-1/3% contingent fee if the matter settled, or if the matter went to trial, the attorney's fees recovered would be only the fees awarded by the Court. Therefore, whatever fee is awarded by the Judge is the only fee that will be collected by the law firm for representation of the Complainant in this case. Affidavit of Marcia S. Rowland.

8. Costs and disbursements totalling \$687.78 are also sought by Complainant. This amount includes charges for the following items: photocopy services, mailing services, facsimile services and depositions costs.

9. The Office of Administrative Hearings' billing costs to the Minnesota Department of Human Rights for the period July 18, 1994 through June 20, 1995, the date of the Findings of Fact and Conclusions of Law issued in this case, totals \$15,549.40.

10. In the Respondent's response to the Complainant's fee Petition, Respondent urges that there be no enhancement to the "lodestar" amount and that fees be awarded based on hours worked and a reasonable hourly rate. Respondent proposes that a reasonable hourly rate for the legal work in this case is \$135 per hour. Respondent does not claim that the hours claimed or legal services provided are unreasonable or inappropriately charged.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. Minn. Stat. §§ 363.071, subd. 7 requires that the Judge order a respondent who has engaged in unfair discriminatory practices to reimburse the Minnesota Department of Human Rights for "all appropriate litigation and hearing costs expended". The appropriate litigation and hearing costs for this proceeding is \$15,549.40.

2. Minn. Stat. § 363.071, subd. 2 (1994), does not expressly authorize an award of costs to a Complainant; however, the Minnesota Human Rights Act does provide for an award of costs to the prevailing party in a District Court action (see Minn. Stat. § 363.14, subd. 3 (1994)), and it is appropriate to allow an award of costs in this proceeding. See,

e.g., Findings of Fact, Conclusions of Law and Order and Award of Attorney's Fees in Karen A. Vovk v. Tom Thumb Food Markets, Inc., 11-1700-4595-2 (Nov. 4, 1991), aff'd in unpub. decision, No. C6-91-2377 (1992 WL 174729) (Minn. App. 1992); Award of Attorney Fees in Berg v. Ilse and Pulling v. Ilse, HR-86-023-PE, 4-1700-565-2 (Oct. 20, 1986).

3. It is appropriate to reimburse the Complainant for costs and disbursements incurred in this proceeding, in the total amount of \$687.78. These charges are reasonable and are properly taxable to the Respondent.

4. Minn. Stat. § 363.071, subd. 2 (1990), provides that "the administrative law judge may . . . order the respondent to pay an aggrieved party who has suffered discrimination . . . reasonable attorney's fees"

5. Complainant is appropriately considered a "prevailing party", having prevailed on the merits of all issues except the marital status claim, a core, interrelated issue. Complainant has won substantial relief and her attorney's fees should not be reduced because of her failure to prevail on the marital status issue. Hensley v. Eckerhart, 461 U.S. 424, 433-40 (1983); Specialized Tours, Inc. v. Hagen, 392 N.W.2d 520, 541 (Minn. 1986); Musicland Group, Inc. v. Ceridian Corp., 508 N.W.2d 524, 535 (Minn. App. 1993).

6. The hours claimed by Complainant for attorney's fees have been carefully scrutinized. They are reasonable and appropriately charged for the legal services performed.

7. It is appropriate to award attorney's fees based upon 188.4 hours of attorney time, and to calculate the fees for Ms. Rowland's time based upon an hourly rate of \$175.00. These rates are reasonable given the background, experience and performance of Ms. Rowland in this matter, the customary billing practices of Standke, Greene, and rates charged by other attorneys practicing in this field.

8. The Complainant is entitled to attorney's fees in the total amount of \$32,970. This amount reflects a reasonable number of hours of attorney time billed at a reasonable rate to represent the Complainant in this matter.

9. These Conclusions are made for the reasons set forth in the attached Memorandum which is incorporated in and made a part of these Conclusions.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED that:

1. The Respondent shall pay within thirty (30) days of the date of this Order jointly to Tracey Schelin and Marcia S. Rowland of Standke, Greene & Greenstein Ltd., the

amount of \$32,970 for reasonable attorney's fees and the amount of \$687.78 for costs in this matter.

2. Respondent shall pay within thirty (30) days of the date of this Order to the Minnesota Department of Human Rights \$15,549.40 for litigation and hearing costs.

3. This Order is effective immediately.

Dated this 21st of September, 1995.

/s/ Allen E. Giles

ALLEN E. GILES

Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 363.071, subd. 2, this Order is the final decision in this case and, under Minn. Stat. § 363.072, any person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. §§ 14.63 through 14.69.

MEMORANDUM

Costs

As mentioned in the Conclusions of Law above, there is no express authorization contained in the Human Rights Act for an award of costs in an Administrative Procedure Act proceeding. The statute does authorize such an award to prevailing parties in District Courts. In light of the similarities between the Executive Branch and Judicial Branch processes in human rights cases, Office of Administrative Hearings decisions have concluded that such an award is appropriate in instances in which a complainant is represented by a private attorney.

The Complainant should not be penalized for requesting an Executive Branch hearing rather than bringing suit in District Court. The nature of the action in District Court is identical to the proceeding before an Administrative Law Judge, and the Legislature must have intended that the same types of awards could be made in both. Accordingly, the Judge has concluded that it is appropriate to allow an award of costs and disbursements in this proceeding. The Respondent has not raised any challenge to the particular costs and disbursements sought by the Complainant, and they appear to be reasonable and justified under the circumstances of this case.

Attorney's Fees

Minn. Stat. § 363.071, subd. 1a (1994) authorizes the Administrative Law Judge to award "reasonable attorney's fees." Minn. Stat. § 363.071, subd. 1a (1994). Minnesota courts have generally followed case law developed under Title VII of the Civil Rights Act of 1964, as amended, in interpreting the attorney's fee provisions of the Minnesota Human Rights Act. For example, the Minnesota Supreme Court noted in Anderson v. Hunter, Keith, Marshall & Co., 417 N.W.2d 619, 628 (Minn. 1988):

Because Minn. Stat. § 363.14, subd. 3 (1986), allowing a successful plaintiff in a discrimination case such as this to recover attorney fees is "virtually identical" to similar provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-3(b), in reviewing attorney fees awards, we have followed federal law. See, e.g., Sigurdson v. Isanti County, 386 N.W.2d 715, 722 (Minn. 1986).

The Court continued, explaining that Hensley v. Eckerhart, 461 U.S. 424 (1983), is "[t]he seminal case addressing the analysis to be employed in awarding attorney fees under federal statutes." Anderson, 417 N.W.2d at 628. It thus is appropriate to look to Hensley and other federal case law as guidance when assessing the proper amount of a fee award under the Human Rights Act.

The Hensley decision requires, as a first step, that a "lodestar" figure be calculated by multiplying the hours reasonably expended in the matter by the reasonable hourly rate. The Supreme Court in Hensley and later decisions has approved consideration of a twelve-factor checklist in arriving at a reasonable and proper award of attorney's fees. See, e.g., Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711, 714-17 (1987); Blum v. Stenson, 465 U.S. 886, 897 (1984); Hensley, 461 U.S. at 434. These factors are as follows:

- (1) the time and labor required;
- (2) the novelty and difficulty of the questions;
- (3) the skill requisite to perform the legal services properly;
- (4) the preclusion of other employment by the attorney due to the acceptance of the case;
- (5) the customary fee;
- (6) whether the fee is fixed or contingent;
- (7) time limitations imposed by the client or the circumstances;
- (8) the amount involved and the results obtained;
- (9) the experience, reputation, and ability of the attorneys;
- (10) the "undesirability" of the case;
- (11) the nature and length of the professional relationship with the client; and
- (12) awards in similar cases.

The leading case discussing these factors is Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974). Accord City of Minnetonka v. Carlson, 298 N.W.2d 763, 766-67 & n. 4 (Minn. 1980) (decided prior to Hensley; sets forth nine factors corresponding in large part to those discussed in Johnson). Although, in the past, courts calculated a lodestar figure and then considered these factors to adjust the figure so that it would be reasonable under the circumstances, "[r]ecent Supreme Court pronouncements on the subject . . . caution courts to take many of these factors into consideration when establishing the lodestar figure itself, and to award enhancements or reductions to the lodestar in only the exceptional case." 3 A. Larson & L. Larson, Employment Discrimination § 58.20 at 11-106.47 (Matthew Bender 1990).

The Judge has considered the principles discussed above in arriving at a reasonable award of attorney's fees in the case at bar.

Complainant has requested an enhancement of the "lodestar" amount by 33-1/3% based upon, inter alia, the risk of taking on this case and the exclusion of other fee generating legal work. The Judge has considered this request and has in part rejected it. The Judge believes that the Minnesota Human Rights Act authorizes an award of attorney's fees to encourage attorneys to take the very risk identified by Complainant. However, establishing the "lodestar amount", the Judge has concluded because of the excellent results obtained in view of the obstacles of this case, enhancements have been included in establishing the lodestar amount. A premium return of attorney's fees is appropriate and that return is represented by the \$175.00 per hour charge in this case.

1. Time and Labor Required

Ms. Rowland's expertise and experience as a litigator and her knowledge of employment discrimination matters obviously served her well, and the Judge has not noted any excess hours expended for the work performed in this matter, or any time spent on duplicative or unnecessary tasks. It appears that Ms. Rowland made efficient and productive use of her time in this case. Significantly, the Respondent has not raised any question regarding the reasonableness of the total time expended on behalf of the Complainant.

2. Novelty and Difficulty of the Questions and 3. Requisite Skill

The issues presented in the case were straightforward and the outcome hinged on the credibility of those testifying at the hearing. Nevertheless, the presentation of Complainant's case was difficult because Ms. Schelin could not afford costs of deposing PGI's witnesses. Thus, in a proceeding where credibility was the major issue, Ms. Schelin went to trial without knowing how PGI's witnesses would testify.

Because no depositions were taken, PGI witness testimony was heard for the first time at the hearing. Using excellent cross-examination skills, Ms. Rowland was largely able to overcome the disadvantage and parlay impeaching testimony that severely reduced the credibility of key PGI witnesses. The Judge is persuaded that a

major reason for the Complainant's success in this case is the cross-examination skills of Ms. Rowland. Adequate representation of the Complainant in a case arising under the Human Rights Act requires litigation skills as well as familiarity with a large body of state and federal rules, guidelines, statutes and case law. Ms. Rowland possessed and displayed these skills and performed the legal services properly.

4. Preclusion of Other Employment due to Acceptance of the Case

While working on this file, Ms. Rowland was unable to spend required time on her hourly-fee-generating work. Standke, Greene & Greenstein, Ltd. is a small office of four or five attorneys with all attorneys essentially working at full capacity. Except for emergency situations, she had no backup attorneys to handle other cases while working on this case. Consequently, she was compelled to turn down other cases and work because of the time commitment of this case.

5. Customary Fee and 6. Fixed or Contingent Fee

The fee agreement in this case was 33-1/3 contingent fee if the matter settled, and if the matter went to trial, total attorney's fees would be those fees awarded by the Court. Because of this agreement, the Standke, Greene & Greenstein, Ltd. law firm will not receive any part of the monies awarded by the Court to Ms. Schelin; instead, the fee awarded by this Order will be the only fee collected by the law firm. Affidavits submitted by Marsh J. Halberg, Bradley W. Solheim and Mark E. Greene establish that the \$175.00 per hour rate sought by the fee Petition is reasonable and consistent with the rates charged by reasonably comparable attorneys practicing in the human rights area.

Respondent asserts that the \$175.00 per hour rate is unreasonable and that the "actual standard billing rate for attorney's fees in matters of this type within the Twin Cities metropolitan area is approximately \$135.00 per hour." Affidavit of Michelle McQuarrie Colton. The affidavit of Ms. Colton states only that \$135.00 per hour is the appropriate charge for sexual discrimination cases; it does not address whether that hourly rate would be advanced upwards based upon the experience of the attorney.

Upon review of the Respondent's argument, the Judge has concluded that the \$175.00 per hour fee sought by the Petition is reasonable and consistent with the rates charged by reasonably comparable Twin Cities attorneys practicing in the employment discrimination area. The fee is also reasonable because of Ms. Rowland's litigation experience and her experience as Carver County Attorney.

7. Time Limitations Imposed by the Client or the Circumstances

This case proceeded to hearing in an expeditious fashion and may have required some rescheduling and delay with respect to other matters handled by Complainant's counsel. However, the hearing dates were selected in an effort to accommodate the schedule of Complainant's counsel, and the Complainant has not provided any specific

evidence that the hearing and briefing schedules in this case interfered with other matters. Accordingly, this factor is not relevant in this case.

8. Amount Involved and Results Obtained

Counsel for Complainant obtained an excellent result for her client and current and future PGI, Inc. employees. Complainant prevailed on her claims of sexual harassment and retaliation. Respondent was ordered to cease and desist from its discriminatory practices and provide appropriate training to management and supervisory personnel with respect to sexual harassment and employment discrimination based on sex, Complainant's wage loss was tripled, and Complainant was also awarded \$100,000 in damages for mental anguish and suffering and \$8,500.00 in punitive damages.

9. Experience, Reputation and Ability of Attorneys

This factor has been discussed above in the discussion of the time and labor required, and the requisite skill of counsel.

10. Undesirability of the Case

The case was not highly desirable because the wage loss damages were tied to Complainant's lower income. Because of Complainant's period of unemployment, she was unable to hire an expert witness to testify as to her mental pain and suffering and she could not afford to depose PGI's witnesses.

11. Nature and Length of the Professional Relationship with the Client

Complainant does not have an ongoing client relationship with the law firm of Standke, Greene, Greenstein, Ltd. It is expected that the law firm will have no further relationship with her as a client. There is no proof in this record that taking on this case will have an adverse impact on the reputation of the Standke, Greene, Greenstein law firm and as a consequence, taking on this case will not have an adverse economic impact on the firm.

12. Awards in Similar Cases

The award of attorney's fees in this case is well within the range of attorney's fees awarded in similar such cases. Complainant cites several cases in Ms. Rowland's affidavit. These include the following: Kolstad v. Fairway Foods, 457 N.W.2d 728 (Minn. Ct. App. 1990) (court approved attorney fees of \$15,636 on client award of \$22,324); Anderson v. Hunter, Keith, Marshall & Co., Inc., 417 N.W.2d 619 (Minn. 1988) (award of \$60,000 as attorney fees only a few hundred dollars less than the plaintiff's recovery is not unreasonable but remanded to the trial court for findings); Musicland Group, Inc. v. Ceridian Corporation, et al., 508 N.W.2d 524, 535 (Minn. Ct. App. 1993), rev. den., (most crucial factor in determining attorney fees is the degree of success obtained and court approved attorney's fees of \$191,877.79 on a total damage award of \$188,618.61 but

remanded for discount on separate claims on which the plaintiff did not prevail); and Huffman v. Pepsi-Cola Bottling Co. of Minnesota and St. Paul, et al., unpublished decision attached (awarded attorney fees of \$400,000 on client award of \$765,379.86).

AEG